

Sports Litigation Alert

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Ambush Marketing at Sponsored Events

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Perhaps you saw Nike's television ads aired during this past summer's Olympic Games in London. Nike's ads depicted everyday athletes competing in events in other cities and towns around the world named London. Or perhaps you noticed Olympic athletes, waiting for the starts of their events, wearing headphones made by and prominently displaying the trademark of headphone maker Beats. If you registered a connection between Nike and the Olympics, or if you noticed those headphones and made a mental note that they must be good if worn by so many topflight athletes, you might have been fulfilling Nike's and Beats' alleged aim of benefitting from association with the Olympic games without having to pay the high price of sponsorship. Beats' and Nike's actions, and those of a number of other product purveyors, are examples of what has been called "ambush marketing", defined as using the publicity and popularity of an event to promote products without paying to become an official sponsor.

Pretty clever, but is it legal? It is certainly irksome to the official sponsors, who often pay big money for their sponsorships, to have their exclusive status undermined and the strength of their sponsorship diluted. Nor is it pleasing to event providers, of course, who want to be able to continue to sell event sponsorships for top dollar. Do event organizers have any legal recourse to prevent this sort of free-riding? The answer, of course, is "it depends", but in many cases the event organizers may have no realistic legal option.

Since the offense in question involves commercial use of trademarks, the first place to look is the law of trademark and unfair competition. Traditional trademark infringement involves the unauthorized

use of someone else's mark (or an approximation of it) to confuse consumers about the source of goods or services—for example, putting the Olympic rings on a t-shirt. Assuming the use is unauthorized, consumers might well conclude that the shirt was a licensed Olympics product, so this conduct could easily be condemned under traditional trademark infringement principles. To take a subtler example, during last summer's Olympics, many London shopkeepers displayed Olympic rings made from their wares (think sausage), trading on the Olympic marks and attempting to benefit from the good will associated with them. Consumers would probably not be confused into thinking that the Olympic organizers had gone into the sausage business, but they might reasonably believe that the shop was an Olympic licensee.

However, ambush marketers are typically not using another's mark but rather are using someone else's venue to display their own mark. Their use of the venue and event is of the same nature as the official sponsor's: the official sponsor is not primarily selling the event but is paying to have the event sell the sponsor. The sponsor benefits from having the audience for the event put their eyeballs—hundreds of millions in the case of the Olympics—on its mark and advertisements and from the good will associated with the event. The official sponsor will usually have a license to use marks of the event organizer or participants to strengthen its association with the event (for example, Visa was authorized to display the Olympic rings in its advertisements), which the ambush marketer will not. But use of the event's marks is not necessary to obtain the benefit of the audience and to bask in the glow of the good will associated with the event. If the ambush marketer does not make use of the event organizer's or venue owner's marks, there is no basis to allege classic trademark infringement.

But is the ambush marketer liable under some other theory, such as section 43(a) of the federal Lanham Act or the common law of unfair competition (which is similar to section 43(a), but state-by-state)? Section 43(a) is

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broader than trademark infringement and prohibits the use of any word, name, symbol, or device—whether or not a registered trademark—so as to create confusion about affiliation, connection, association or sponsorship.

In one sense, the very purpose of ambush marketing is to benefit from some level of association with the event. The question is whether that association is of the kind that violates section 43(a).

If the ambush marketer uses any names or marks or other indicia in a way that suggests a formal association with the event, then there may well be a section 43(a) claim. “For instance, if a seller of goods in the United States were, without authority from the United States Olympic Committee, to use an image of a recognizable scene at the Olympics (a photo of USA athletes marching in the opening ceremony, for example), it would probably be liable under section 43(a) even if no Olympic symbols or other marks were depicted. But what about merely arranging to have one’s marks visible in the background of events or in the environs of the event? If no mark or device is used to suggest an official sponsorship or association, or no statement to that effect is made, the event organizer probably has no section 43(a) or other trademark-related claim.

Given the limited applicability of trademark principles to such issues, several countries, including Great Britain, Canada, Australia and South Africa, have passed special legislation to protect venue owners from ambush marketing. (There is also special legislation in the United States, the Amateur Sports Act, that gives the USOC broad protection against the use of its marks to imply association with the Olympics.) Such legislation typically prohibits implying a commercial or contractual association with the event without justification, and provides for remedies including penalties for violations, including in some instances criminal penalties. These laws are controversial, as many see them as overreaching by event organizers and unduly limiting commercial and free speech rights. To address these objections, anti-ambush marketing laws are often made time- and/or event-specific.

Without ambush marketing legislation, event owners might need to look for other legal bases for relief, such as trespass or contract. For instance, venue owners or event organizers can attach conditions to the use of tickets to an event so that tickets are invalidated if the ticket holders engage in ambush marketing—like the orange-clad models promoting Bavaria beer at the

2010 World Cup, to the consternation of official sponsor Budweiser. If the tickets are voided, the ticket holders become trespassers, and may also be liable for breach of contract (a ticket is a kind of contract). It is unclear whether contractual provisions imposing monetary damages—such as a requirement to pay the reasonable value of the unauthorized marketing activity—could be enforced. Such measures might admittedly be less than fully effective given that civil suits to enforce breach of contract would occur typically only after the fact and would serve in part to bring the very attention to the ambusher that was initially sought. In addition, ambush marketers often have valid defenses grounded in free speech as well as the limits of trademark law, and therefore an event organizer risks creating bad precedent for itself. Nevertheless, pursuit of ambush marketers—even if the result is a settlement—may pay off in the end as a disincentive to others contemplating similar actions.

Another limitation of ticket-based remedies is that they would apply only to spectators. If Michael Phelps chooses to wear Beats headphones between races, or to wear a warm-up suit made by a non-sponsor, what can the Olympic organizers do? They might try to limit competitors’ gear to sponsor products, but the athletes—who have their own endorsement deals, as well as personal preferences—would surely rebel. Since the financial success of the Olympics depends on superstar competitors, the athletes would win. Athlete-based ambush marketing may be here to stay.

Thus far, ambush marketing campaigns have targeted a few high-profile events such as the Olympics, the World Cup, and tennis’s U.S. Open. But since the practice has been very successful in generating publicity, and the perpetrators have usually escaped legal consequences, we should expect it to become widespread, with more modest sponsored events becoming the next tier of targets. Event organizers and their sponsors would be well advised to decide in advance how to respond.

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